


# ***TD 2024/6EC - Compendium***

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## Public advice and guidance compendium – TD 2024/6

### **❗ Relying on this Compendium**

This Compendium of comments provides responses to comments received on draft Taxation Determination TD 2023/D3 *Income tax: trustee risk reserves – deductibility of payments made by a superannuation fund to its trustee*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO's general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

### **Summary of issues raised and responses**

All legislative references in this Compendium are to the *Income Tax Assessment Act 1997* (ITAA 1997), unless otherwise indicated.

Issue number	Issue raised	ATO response
1	<p><b><i>Distinction between the trustee acting in its own capacity and the trustee acting in the capacity of a trustee of a trust</i></b></p> <p>The trustee acts in its own capacity and the trustee acts in the capacity of a trustee of a trust. The law makes it very clear that, despite the legal relationship between a trustee and a trust, the superannuation fund itself is a taxpayer separate and distinct from the trustee company. Each lodges tax returns on its own behalf and the intent or actions of one cannot be imputed to the other. Each must be considered separately for income tax purposes.</p> <p>The draft Determination does not differentiate between the business and operations of a trustee entity from the operations of superannuation funds that it services.</p>	<p>We agree that the distinction between a trustee acting in the capacity of trustee of a trust and a trustee acting in its own capacity is an important distinction. We also acknowledge that a trustee and a superannuation fund are 2 different entities for income tax purposes. Accordingly, in the final Determination, we have updated paragraph 1 to ensure it is clear which capacity we are referring to in relation to the deductibility of payments that are made by the trustee of the fund (in its capacity as trustee) under section 8-1.</p> <p>We note that the taxation consequence of payments received by the trustee in its own capacity is outside the scope of this Determination.</p>
2	<p><b><i>Revenue versus capital distinction</i></b></p> <p>The draft Determination expresses the ATO's view that under the general deduction provision (section 8-1), additional</p>	<p>We consider that the Determination is consistent with leading case law on the revenue versus capital distinction including <i>Commissioner of Taxation v Sharpcan Pty Ltd</i> [2019] HCA 36 (<i>Sharpcan</i>) and the additional references in</p>

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	<p>specific fees paid into a risk reserve are not deductible, but an increase to the existing ongoing recurrent charges for trustee services can be.</p> <p>The case law on the revenue versus capital distinction regarding section 8-1 focuses on substance over form. The ATO's view and the distinction drawn in the draft Determination, based on form, appears inconsistent with the case law regarding the revenue versus capital distinction. The view appears to be based on the form of the payment rather than the substance of the advantage that the payments secure.</p>	<p>the final Determination to <i>Sun Newspapers Limited v Federal Commissioner of Taxation</i> [1938] HCA 73 (<i>Sun Newspapers</i>) and <i>Mussalli v Commissioner of Taxation</i> [2021] FCAFC 71 (<i>Mussalli</i>).</p> <p>The reference to the facts being objectively determined also ensures that it is the substance of the transaction and not the form that is relevant.</p> <p>Further, the final Determination has been updated to clarify that in determining whether a loss or outgoing is of capital, or of a capital nature, it is first necessary to identify what the payment made by the fund to the trustee is for and then to determine the character of the advantage that is being sought.</p>
3	<p><b><i>Payments to compensate for additional risk</i></b></p> <p>There is no compelling reason why payments made to compensate for additional risk arising from subsection 56(2) of <i>Superannuation Industry (Supervision) Act 1993</i> (SISA) ought necessarily be capital in nature in all instances, but likewise, there could be circumstances in which they may be. Each arrangement should be assessed on its own facts.</p>	<p>We agree that each arrangement should be assessed on its own facts. The courts have identified a range of matters that are taken into consideration to determine whether a loss or outgoing is of capital, or of a capital nature, and is therefore excluded from deductibility under paragraph 8-1(2)(a) (see <i>Sharpcan</i> and <i>Sun Newspapers</i>). These are matters that need to be objectively determined on the facts of each particular arrangement (see <i>Mussalli</i>).</p>
4	<p><b><i>Enduring benefit</i></b></p> <p>The draft Determination does not outline a rationale nor clearly identify an enduring benefit to a superannuation fund as a result of the incursion of additional costs from the trustee. The payment of a trustee fee does not secure a lasting or enduring advantage that enhances or preserves the superannuation fund's profit-making structure.</p>	<p>The final Determination has been updated, particularly in paragraphs 30 to 42 of the Explanation section, to provide further information regarding how the Commissioner's view has been reached.</p> <p>To determine whether a loss or outgoing that is incurred is of capital, or of a capital nature, it is first necessary to identify what the payment made by the fund to the trustee is for and then to determine the character of the advantage that is being sought. This needs to be objectively determined on the facts of each case. Where the fund is making a payment to the trustee for the trustee to build a sufficient reserve to pay any penalties it may incur, which is separate and distinct from the ongoing charges for the provision of the trustee's services, the fund is receiving an enduring benefit in respect to the stability of its income-producing structure.</p> <p>Where it is objectively determined on the facts that the payment is merely fees for the provision of the trustee's services, the payment will ordinarily be deductible to the fund (to the extent it does not relate to gaining or producing exempt or non-assessable non-exempt income).</p>

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5	<p><b><i>The principles of administering taxation and superannuation law</i></b></p> <p>The draft Determination is not aligned in principle with the purpose of the amendments to sections 56 and 57 of the SISA, nor with the duties and powers conferred on the ATO as administrator of the ITAA 1997 and its responsibilities for the oversight of taxation of the industry's compliance response to these regulatory changes.</p>	<p>We consider the Determination is consistent with the case law in relation to determining the deductibility of expenses under section 8-1.</p>
6	<p><b><i>Unlevel playing field</i></b></p> <p>The ATO should reconsider its view that trustee fees are not deductible for superannuation funds as this will likely create an unlevel playing field for profit-for-members vis-à-vis for-profit funds.</p>	<p>We consider the Determination is consistent with the case law in relation to determining the deductibility of payments made by a superannuation fund to its trustee under section 8-1.</p>
7	<p><b><i>Policy intent</i></b></p> <p>The ATO should reconsider its views by considering the policy intention of the amendments to section 56 of the SISA and which entity is intended to be impacted by the amendments to section 56.</p>	<p>We consider the Determination is consistent with the case law in relation to determining whether an expense is deductible under section 8- 1.</p>
8	<p><b><i>Deductibility of trustee fees</i></b></p> <p>The draft Determination is inconsistent with Taxation Ruling TR 93/17 <i>Income tax: income tax deductions available to superannuation funds</i>, which accepts that a trustee fee or fees incurred by a superannuation fund are necessarily incurred by the taxpayer in deriving assessable income and are not of a capital nature.</p>	<p>We disagree that there is an inconsistency between the Determination and TR 93/17. Where the fees being charged by the trustee are for the services the trustee provides to the fund, then the expense will ordinarily be deductible under section 8-1. As explained at paragraphs 25 and 26 of the final Determination, the use of the word 'ordinarily' in paragraph 4 of TR 93/17 acknowledges that expenditure labelled trustee fees may not always be deductible under section 8-1 and that an examination of what the payment is for is still required.</p> <p>Further, the final Determination has been updated to clarify that in determining whether a loss or outgoing is of capital, or of a capital nature, it is first necessary to identify what the payment made by the fund to the trustee is for and then to determine the character of the advantage that is being sought.</p>
9	<p><b><i>What the trustee does with the payments is not a relevant consideration when examining deductibility</i></b></p>	<p>The Commissioner's view in the Determination is not focused on what the trustee does with the payment. Rather, the relevant question to be</p>

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	<p>Case law is very clear that to determine whether an expense incurred by a taxpayer is deductible or not, the relevant examination is in relation to the taxpayer that incurred the relevant loss or outgoing. What the other taxpayer does with the income it derives is not a relevant consideration when considering the deductibility to the taxpayer incurring the expense. The fact that the trustee, in its own capacity, is able to create retained earnings from the profits made by charging these fees is not a relevant consideration as to the deductibility of the fee or fees from the perspective of the superannuation fund.</p>	<p>determined is what the payment made by the fund to the trustee is for. Then it must be determined what the character of the advantage is that is being sought by the fund. This has been more clearly articulated in the final Determination (see in particular paragraph 36 of the final Determination).</p>
10	<p><b><i>The increased costs should be deductible whether the trustee chooses to increase existing trustee fees or charge additional fees</i></b></p> <p>In response to section 56 of the SISA, trustees were required to consider how they would address the additional risk. Some trustees decided to build up a risk reserve by seeking capital from shareholders to create retained earnings. Some could not and some sought court permission to change their trust deed.</p> <p>The cost of providing trustee services has increased as a result of the increased risk due to the amendment to section 56 of the SISA.</p> <p>Trustees have sought to increase existing trustee fees or charge additional fees. However, in both situations, the fund is still incurring a 'trustee fee' that should be deductible.</p>	<p>The Determination notes that impacted funds and their trustees may take differing approaches to address the risk of exposure to penalties arising from the amendments to section 56 of the SISA.</p> <p>To determine whether a loss or outgoing that is incurred is of capital, or of a capital nature, it is first necessary to identify what the payment made by the fund to the trustee is for and then to determine the character of the advantage that is being sought. This needs to be objectively determined on the facts of each case. Where the fund is making a payment to the trustee for the trustee to build a sufficient reserve to pay any penalties it may incur, which is separate and distinct from the ongoing charges for the provision of the trustee's services, the fund is receiving an enduring benefit in respect to the stability of its income-producing structure.</p> <p>Where it is objectively determined on the facts that the payment is for the provision of the trustee's services, the payment will ordinarily be deductible to the fund (to the extent it does not relate to gaining or producing exempt or non-assessable non-exempt income).</p>
11	<p><b><i>Section 40-880</i></b></p> <p>The ATO should also expand its views on the application of section 40-880.</p> <p>The comments in Footnote 2 should be included in the body of the final Determination. An analysis of the Commissioner's view in Appendix 1 – Explanation should also be included as it will be important for a significant number of superannuation</p>	<p>The application of section 40-880 is outside the scope of the Determination. Furthermore, as mentioned in Footnote 2 of the Determination, key aspects of the application of this provision are already outlined in TR 2011/6 <i>Income tax: business related capital expenditure – section 40-880 of the Income Tax Assessment Act 1997 core issues</i>.</p> <p>No change has been made in the final Determination.</p>

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	funds that implement a lump sum model for the trustee's risk reserves. Further detail on this point will ensure that these funds will be better able to understand and apply the Commissioner's view.	
12	<p><b>Successor funds transfer (SFT)</b></p> <p>The final Determination should provide the details of, and reasoning for, the Commissioner's view regarding the deductibility of expenses relating to the trustee's risk reserves when superannuants are transferred under a successor funds transfer (SFT). Providing guidance on this aspect will ensure that trustees understand the consequences of a SFT, and the implications for the superannuation fund.</p>	This is outside the scope of the Determination.
13	<p><b>Deductibility of payments should not require an 'objective' determination of the facts</b></p> <p>What does the reference to 'where it is objectively determined' mean? What are the factors relevant to this draft Determination? What is the legislative basis for this comment?</p> <p>The case law looks at the purpose of the taxpayer incurring the expense or outgoing when determining deductibility, not an 'objective' purpose.</p> <p>Paragraphs 5, 6 and 34 of the draft Determination state that the facts supporting the trustee's increase in ongoing and recurrent fees or a lump sum payment need to be 'objectively determined'. We are of the view that this requirement is not present in the legislation, or the case law referred to in the explanatory section of the draft Determination, and it should be removed.. We consider that it would be unreasonable for the Commissioner to require a higher threshold than that which is imposed by the law.</p> <p>If the Commissioner is of the view that this additional requirement is appropriate, the Determination should explain</p>	<p>The Determination is consistent with leading case law on the revenue versus capital distinction including <i>Sun Newspapers</i>, <i>Sharpcan</i> and <i>Mussalli</i>.</p> <p>The final Determination has been updated to provide further explanation for the Commissioner's position.</p>

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	the rationale for the Commissioner adopting this position with the appropriate legislative and judicial support. Additionally, the final Determination should provide examples illustrating how the fee structure may be 'objectively determined' and the evidence superannuation funds and trustees can use to substantiate their position.	
14	<p><b><i>Characterisation of the receipts of payments in the hand of the corporate trustee</i></b></p> <p>The draft Determination does not provide guidance on the Commissioner's view regarding the appropriate characterisation of the receipts of payments in the hands of the corporate trustee. We consider that it would be helpful to clarify the Commissioner's view in this regard to assist superannuation funds and their advisers to better understand the tax implications for all parties involved.</p> <p>If the final Determination were not broadened in this regard, this may be appropriate for a separate taxation determination or other product, and should also contemplate guidance on the:</p> <ul style="list-style-type: none"> <li>• requirement for trustees to hold and maintain Operational Risk Financial Requirement (ORFR) reserves under the SISA</li> <li>• tax implications if the trustee returns excess ORFR amounts held by the trustee to the superannuation fund, and</li> <li>• utilisation of the ORFR by the trustee to compensate member accounts.</li> </ul>	This is outside the scope of the Determination.
15	<p><b><i>Apportionment for exempt income or non-assessable non-exempt income</i></b></p> <p>In respect of the situation where some of the expenditure incurred by the fund is in relation to gaining or producing exempt income or non-assessable non-exempt income, the draft Determination states that a reasonable apportionment</p>	In the final Determination, we have expanded paragraph 7 to note that where some of the expenditure incurred by the fund is in relation to gaining or producing exempt income or non-assessable non-exempt income, a fair and reasonable apportionment will be required by the fund in respect of its deduction due to the operation of paragraph 8-1(2)(c). We have added that

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	<p>will be required by the fund in respect of its deduction due to the operation of paragraph 8-1(2)(c).</p> <p>We would apply the normal methodology for indirect expenditure as the Commissioner has previously articulated his views in TR 93/17, as amended.</p>	<p>TR 93/17 outlines the Commissioner's views on acceptable methods of apportionment of expenses in this context.</p>
16	<p><b>Example 1 – characterisation of payment</b></p> <p>We do not agree with the characterisation of this example. It is not a payment to establish a risk reserve. Rather, the trustee has increased their fees to their client, being the superannuation fund. The trustee has generated retained earnings, which it has retained and used to build a reserve.</p> <p>The Commissioner appears to be applying reverse logic in order to justify the conclusion that the payments are capital in nature.</p> <p>In practice, the ongoing \$100,000 per month could just as easily have been an ordinary increase in the fee. In any case, the purpose to which the trustee company puts the money is irrelevant. The question to be asked is what if any enduring benefit the fund obtains from the making of the payment? In our opinion there is none.</p> <p>There is no enhancement to the superannuation fund's profit-yielding structure and there is no enduring benefit to the fund in making the payment. It is the trustee that faces a riskier world, and this is the reason for the levying of higher payments to the fund, either immediately (if the trustee seeks to be ready for this risk immediately), over a short period of years (if the trustee seeks to be ready for this risk in a small number of years), or over a longer period in higher ongoing fees (if the trustee is happy to accept this risk for a longer period). From the fund's perspective, it has a trustee, just like it always has, and is getting the same services from the trustee as it always has. It has no choice but to pay the fees demanded.</p>	<p>The Commissioner, after carefully considering the comments made, maintains the view as expressed in the draft Determination. However, the final Determination has been updated, particularly in paragraphs 30 to 42 of the Explanation section, to provide further information regarding how the Commissioner's view has been reached.</p> <p>The courts have identified a range of matters that are taken into consideration to determine whether a loss or outgoing is of capital, or of a capital nature, and is therefore excluded from deductibility under paragraph 8-1(2)(a) (see <i>Sharpcan and Sun Newspapers Limited</i>).</p> <p>To determine whether a loss or outgoing that is incurred is of capital, or of a capital nature, it is first necessary to identify what the payment made by the fund to the trustee is for and then to determine the character of the advantage that is being sought. This needs to be objectively determined on the facts of each case (see <i>Mussalli</i>).</p> <p>Where the fund is making a payment to the trustee for the trustee to build a sufficient reserve to pay any penalties it may incur, which is separate and distinct from the ongoing charges for the provision of the trustee's services, the fund is receiving an enduring benefit in respect to the stability of its income-producing structure.</p> <p>In Example 1, the trustee decides to charge Greendove Superannuation Fund an initial lump sum fee of \$10 million to establish the reserve, with a new ongoing monthly fee of \$100,000 per month for 4 years to build the reserve. The new risk reserve fees are separate and in addition to the trustee's existing monthly trustee service fees (that is, the fees it charges the fund for the provision of its services) and are reported separately in Greendove Superannuation Fund's financial statement.</p> <p>As such, the additional risk reserve payments by Greendove Superannuation Fund to the trustee will not be deductible under section 8-1 because they are</p>



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	We consider that the payments should be deductible when incurred by the superannuation fund (and assessable income to the trustee).	capital, or of a capital nature, and are therefore excluded from deductibility under section 8-1 due to the operation of paragraph 8-1(2)(a).
17	<p><b>Additional examples</b></p> <p>The draft Determination would also benefit from addressing further situations:</p> <ul style="list-style-type: none"> <li>• where the trustee previously incurred directors' fees and insurance, then sought reimbursement from the superannuation fund</li> <li>• where all costs relating to the provision of trustee services, even directors' fees and insurance, were previously borne directly by the superannuation fund, and</li> <li>• increase in trustee fees charged where part of the increase in quantum is variable year on year – depending upon the trustee's assessment of their risks, and hence their costs of providing trustee services. It is highly likely that the immediate response of trustees to section 56 of the SISA will not be a one-off. Rather, there will be an ongoing, enterprise-wide, review of capital and reserve requirements, including the extent to which such capital or reserves are held within the trustee company or within the fund.</li> </ul>	These scenarios are outside the scope of the Determination.
18	<p><b>Capital reserves</b></p> <p>Tax settings mean that there will be a preference for capital or reserves to be held within funds rather than in the trustee company, and this is so even where payments from funds to the trustee are fully deductible. The ATO's view as expressed in the draft Determination represents a further commercial impediment to holding capital or reserves at the trustee level (which the Australian Prudential Regulation Authority should have concerns with).</p>	<p>The final Determination notes that impacted funds and their trustees may take differing approaches to address the risk of exposure to penalties arising from the amendments to section 56 of the SISA.</p> <p>The courts have identified a range of matters that are taken into consideration to determine whether a loss or outgoing is of capital, or of a capital nature, and is therefore excluded from deductibility under paragraph 8-1(2)(a) (see <i>Sharpcan</i> and <i>Sun Newspapers</i>). These are matters that need to be objectively determined on the facts of each particular arrangement (see <i>Mussalli</i>).</p>

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	<p>The element of variability and ongoing assessment of the corporate trustee's risk profile also goes to the point that it is a matter for the corporate trustee to assess and address the increased risks of provision of the trustee services. How the trustee chooses to do this is up to the trustee but the same fundamental principle applies – it is charging fees to the fund commensurate to what it considers appropriate to its circumstances. This does not change the characterisation of what is being paid for by the fund – that is, fees for trustee services.</p>	<p>The final Determination has been updated to articulate more clearly, by reference to these cases, that in determining whether a loss or outgoing is of capital, or of a capital nature, it is first necessary to identify what the payment made by the fund to the trustee is for (from the perspective of the fund) and then determine the character of the advantage that is being sought.</p>
19	<p><b><i>Compliance approach</i></b></p> <p>Will the Commissioner not apply compliance resources to any amounts paid in the 2021–22 and 2022–23 income years?</p> <p>What will be the Commissioner's compliance approach for the 2021–22 and 2022–23 income years?</p> <p>Taxpayers may have taken the view that any additional payments, made in addition to ordinary trustee services, should be deductible as an additional trustee fee.</p> <p>We question whether it is appropriate for the final Determination to have retrospective application given the lack of guidance on this issue, which was known to be an issue prior to 1 January 2022.</p>	<p>The Commissioner considers that the Determination is consistent with the existing ATO view and established case law regarding the application of section 8-1. The draft Determination was published before the funds' 2022–23 tax returns were generally required to be lodged, and both the 2021–22 and 2022–23 tax returns were not required to be lodged until after consultation with industry had occurred (from mid-2022). As such, a specific compliance approach on this issue has not been adopted.</p>